



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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SAN FRANCISCO, CA 94102

REGION IX
CALIFORNIA

December 7, 2018

SENT VIA EMAIL

Cindy Marten
Superintendent
San Diego Unified School District
4100 Normal Street
San Diego, California 92103

(In reply, please refer to case no. 09-17-1550.)

Dear Superintendent Marten:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the District. The Student's parents (Complainants) alleged that the District discriminated against the Student on the basis of disability.¹ Specifically, OCR investigated whether the District responded adequately to an internal complaint or complaints made during the spring and/or summer of 2017, including on June XX, 2017, on behalf of the Student, alleging discrimination on the basis of disability.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, at 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability in programs and activities operated by recipients of federal financial assistance. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12131 *et seq.*, and its implementing regulation, at 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities. As a recipient of federal financial assistance and as a public education system, the District is subject to Section 504, Title II, and their implementing regulations.

To investigate this complaint, OCR reviewed documents and information provided by the Complainants and the District, and OCR interviewed the Complainants. However, prior to OCR completing its investigation, the District voluntarily agreed to address the areas of concern identified by OCR with respect to the issues investigated. This letter summarizes the applicable legal standards, the relevant facts obtained during the investigation, and the terms of the resolution reached with the District.

¹ OCR previously provided the District with the identity of the Complainant(s) and Student. We are withholding their names from this letter to protect their privacy.

Issue: *Whether the District responded adequately to an internal complaint or complaints made during the spring and/or summer of 2017, including on June XX, 2017, on behalf of the Student alleging discrimination on the basis of disability.*

Legal Standards

The Section 504 regulations, at 34 C.F.R. § 104.7(b), require a recipient employing 15 or more persons to adopt grievance procedures that incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging disability discrimination. The Title II regulations, at 28 C.F.R. § 35.107(b), similarly require a public entity employing 50 or more persons to adopt and publish prompt and equitable grievance procedures.

OCR evaluates the appropriateness of the responsive action to alleged discrimination on the basis of disability by assessing whether it was prompt and equitable. What constitutes a reasonable response to discrimination will differ depending upon the circumstances. However, in all cases the district must promptly conduct an impartial inquiry designed to reliably determine what occurred. The response must be tailored to stop the discrimination, and remedy the effects of the discrimination on the student who was discriminated against. The district must also take steps reasonably calculated to prevent the discrimination from recurring.

Other actions may be necessary to repair the educational environment. These may include special training or other interventions, the dissemination of information, new policies, and/or other steps that are designed to clearly communicate the message that the district does not tolerate discrimination and will be responsive to student reports of discrimination. The district also should take steps to prevent any retaliation against the student who made the complaint or those who provided information.

Facts Gathered to Date & Analysis

Background

During the 2016-2017 school year at issue, the Student attended a school in the District (School). The District had previously identified the Student as an individual with a disability, and he had an Individualized Education Program (IEP) plan dated April XX, 2016 based on autism. The Student was in general education classrooms for the entire school day. Under a section titled “Supports for Instruction,” the Student’s IEP stated that he shall be provided “[d]irections in a [v]ariety of [w]ays.” It instructed staff working with the student to “[c]heck for understanding by asking [Student] to repeat or paraphrase the directions.” The IEP also called for extended time on tests (1.5 times), use of language scaffolds, and preferential seating for the Student.

During the 2016-2017 school year, the Student was enrolled in an XXXXXX XXXXXXXXXX course at the School. He received a Fall 2016 Semester grade of a “C” in the course. According to the Complainants, they filed a written complaint with the District alleging the Student’s XXXXXXXXXX grade was harmed by the School’s failure to implement his IEP, and the District did not adequately respond to their complaint.

Specifically, the Complainants alleged that the Student's XXXXXXXXXX teacher did not receive, and therefore, did not implement the Student's IEP for approximately the first one-and-a-half months of school, August XX, 2016 until October XX, 2016. The Complainants also alleged that even after receiving the IEP, the XXXXXXXXXX teacher did not implement part of the IEP that called for the Student to receive "[d]irections in a [v]ariety of [w]ays." The Complainants stated that this particularly impacted the Student's grade on a semester-long notebook project, which was not graded until the end of the semester, and which brought the Student's overall grade down to a "C." According to the Complainants, the Student earned an 86 out of 100 on the Chemistry final and, notwithstanding the notebook, had a "B" going into the final. After failing the notebook, the Student received a C for his semester grade. The Complainants alleged that the Student would have earned a higher grade on the notebook, and therefore the class, if his IEP had been implemented with regard to the notebook.

Complaint of Discrimination & District Response

OCR found that the Complainants complained in writing to the Principal on May X, 2017, and the District on June XX, 2017, alleging the District discriminated against the Student based on his disability with respect to the Student's XXXXXX XXXXXXXXXX class. Specifically, the May X, 2017 email to the Principal and June XX, 2017 grade appeal both alleged that the Student's IEP was not implemented and that this failure to implement the Student's IEP caused him to receive a low notebook grade in the course, which in-turn caused the Student's Fall 2016 Semester grade to be lower than it otherwise would have been.

The District has a Uniform Complaint Policy (UCP) which covers complaints of disability discrimination and provides a process for the impartial investigation of complaints by a person knowledgeable/trained in the relevant area of law, the opportunity to present witnesses and other evidence; designated and reasonably prompt timeframes for major stages of the complaint process; notice to the parties of the outcome of the complaint; and an assurance that steps will be taken to prevent recurrence of any discrimination and to correct its effects. The District did not investigate the complaints at issue in this matter under its UCP. Rather, the District used its grade change appeal procedure. The District's grade change appeal procedure provides that a grade may be changed if it was given "fraudulently, in bad faith, because of incompetency, or because of clerical or mechanical mistake." The grade appeal procedure does not include a provision for addressing allegations of discrimination related to grading.

In processing the grade appeal, the District told OCR that the Principal looked into the alleged failure to implement the Student's IEP and determined that the Student's IEP was implemented. The documentation provided to OCR regarding the Principal's decision did not include the Principal's basis for this determination, the individuals interviewed, or the information or documentation relied upon in reaching the determination. To date, OCR has not received any evidence that the Principal provided the Complainants with oral or written notice of his determination that the Student's IEP was implemented during the course, or the basis for this determination.

The Complainants met with the Principal regarding the grade on or about May X, 2017, and pursuant to the grade appeal procedure, were to receive a decision within 10 days. Emails from the Complainants to the Principal, indicated that they had not received a decision from the Principal approximately 20 days later, and the Complainants planned to move forward with an appeal to the Office of Secondary Teaching and Learning (the Office), which they filed on June XX, 2017. On June XX, 2017, the Office sent the Complainants a letter, which acknowledged their grade appeal, stated that the Principal had not substantiated their allegation (no further explanation was provided), and reiterated the grade change process, including that the teacher needed to be involved to the extent practicable. The letter stated that the Office would convene a panel within 30 days of the appeal to decide the appeal.

As of September 2018, the District had not provided OCR with any further correspondence from the Office or the District to the Complainants. The District told OCR that the Office did not make a determination on the appeal because “the parents and teacher had not met in person regarding the issue.” The District stated that although the Principal “offered to meet with the parents and teacher,” the “parents did not respond to the request.” Emails between the Vice Principal, Principal, Complainants, and the XXXXXXXXXX teacher provided to OCR by the District show that the Complainants requested to meet with the teacher. The Vice Principal responded that the teacher had already discussed the grade at the IEP meeting and had decided not to change it, so the next step was to meet with the Principal. The XXXXXXXXXX teacher also stated that she was told not to meet with the Complainants and to let the Principal handle the appeal. OCR had not received any information showing that the Office convened a panel or that the Complainants received any notice of outcome related to the allegation of disability discrimination, which was part of the grade appeal.

Accordingly, based on the facts gathered to date, OCR had a concern that the Principal may not have conducted an adequate and impartial investigation into the allegations that the IEP was not implemented or provided notice of the basis for the determination to the Complainants. While a recipient is not required to provide for an appeal of a discrimination complaint determination, when its grievance procedures include an appeal, the appeal must be provided in an equitable manner. Here, OCR was also concerned that the Complainants did not have access to the appeal process, based on incorrect information provided by the District about the steps necessary to access an appeal.

However, on October XX, 2018, the District provided OCR with documentation showing that after OCR discussed these compliance concerns with the District on September XX, 2018, the District took steps to resolve this issue. Specifically, the District held a Grade Appeal meeting with the parents on September XX, 2018, and shortly thereafter, the School Principal sent a letter to the Complainants dated October X, 2018, in which the Principal explained that “[a]fter reviewing all of the information . . . [he] determined that there is evidence of clerical or mechanical mistake in that the [D]istrict was not implementing the [S]tudent’s IEP with respect to accommodations as they applied to the notebook during some or all of the first semester” and therefore the District had removed the notebook grade and recalculated the Student’s grade for the course. On October XX, 2018, the District also provided OCR with documentation showing it had revised the Student’s transcript to reflect his new grade for the course.

Conclusion

OCR has not completed the investigation of the allegation in this case. In order to complete the investigation, OCR would interview the additional site and District employees who investigated the complaint and who made the decision not to consider the Complainants' June XX, 2017 grade appeal. Prior to the conclusion of OCR's investigation and to address the issue alleged in this complaint and the concerns OCR identified, the District, without admitting to any violation of law, took steps to recalculate the Student's grade, revise his transcript accordingly, and signed the enclosed Resolution Agreement (Agreement) on December X, 2018, which is aligned with the complaint allegations and the information obtained by OCR during its investigation. Pursuant to the Agreement, the District will revise its grade change and UCP policies and procedures to ensure that grade change appeals that include allegations of disability discrimination are handled promptly and equitably, and provide corresponding written guidance for staff.

Based on the steps the District has taken to date, and the commitments made in the enclosed Agreement, OCR is closing the investigation of this complaint as of the date of this letter, and notifying the Complainants concurrently. When fully implemented, the Agreement is intended to address the complaint allegations. OCR will monitor the implementation of the Agreement until the District is in compliance with the terms of the Agreement. Upon completion of the obligations under the Agreement, OCR will close the case.

OCR's determination in this matter should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

Please be advised that the District may not harass, coerce, intimidate, retaliate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the individual may file another complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by the law, personal information that, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

OCR would like to thank the District for its cooperation in resolving this case, including Special Education Division/ADA/504 Director of Operations, Lisa Dreyer, and Assistant General Counsel II, Patrick D. Frost. If you have any questions regarding this letter, please contact OCR Senior Attorney Brian Lambert at 415-486-XXXX or Brian.Lambert@ed.gov.

Sincerely,

/s/

Rhonda Ngom
Acting Team Leader

cc: Lisa Dreyer, Director of Operations, Special Education Division/ADA/504, San Diego Unified School District (email)
Patrick D. Frost, Assistant General Counsel II, San Diego Unified School District (email)